90-510

No. 90-_____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

GERALD VICTOR BOUCHER,

Petitioner-Appellant

vs.

UNITED STATES OF AMERICA,

Respondent-Appellee

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the District Court err in denying Petitioner-Appellant's motion to suppress evidence seized as a result of his arrest following a routine traffic stop?

A. Did the presence of a weapon in plain view give the arresting officer probable cause to search Petitioner's vehicle?

B. Did the District Court err in refusing to declare Petitioner's statements inadmissible when his freedom had been deprived in a significant way?

C. Did the scope of the search exceed Petitioner's consent?

D. Was there a factual basis for Petitioner's guilty plea to the weapons charge, particularly when there were two weapons involved?

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The District Court's order is attached as "Appendix 1."

The opinion of the Eighth Circuit Court of Appeals affirming the District Court's denial of the motion to suppress is attached heretofore as "Appendix 2."

STATEMENT OF JURISDICTION

The decision of the Eighth Circuit Court of Appeals was rendered on July 27, 1990, and the mandate was also issued on July 27, 1990. No motion for rehearing was filed in the United States Court of Appeals, however this petition is filed within ninety days from the United States Court of Appeals' affirmation of the District Court's denial of the motion to suppress. Opinion filed July 27, 1990. The United States Court of Appeals for the Eighth Circuit had jurisdiction pursuant to Petitioner's conditional plea in the District Court, *Federal Rules of Criminal Procedure, Rule 11(a)(2),* and *11(f);* and *Federal Rules of Appellate Procedure, Rule 4(a), 4(b),* and 28 U.S.C. §1291. This Court has jurisdiction of this matter under *Supreme Court Rules, Rule 10, 11, 12,* and *13.* Jurisdiction is further based on *Rule 10.1(a), Supreme Court Rules,* because the United States Court of Appeals "has rendered a decision in conflict with the decision of another opinion in the United States Court of Appeals on the same matter, and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's

power of supervision." Further, jurisdiction is asserted pursuant to *Rule 10.1(c)*, in that the United States Court of Appeals for the Eighth Circuit has decided an important question of Federal law which has not been, but should be, settled by this Court, or, in the alternative, has decided a Federal question in a way that conflicts with applicable decisions of this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in pertinent part, that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated.

The Fifth Amendment to the United States Constitution provides, in pertinent part, that:

> Nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that:

> Nor shall any state deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

Mr. Boucher filed a motion to suppress physical evidence and statements, and this motion was denied by the District Court judge on May 1, 1989. Subsequently, Mr. Boucher entered a conditional plea to possession with the intent to distribute marijuana, in violation of 21 U.S.C. §841(a)(1), to which he was convicted and sentenced to twenty-one (21) months, and a conditional plea to the use of a firearm in relation to the possession with intent to distribute, in violation of 18 U.S.C. §924(c), to which he was convicted and sentenced to a consecutive five (5) years. Boucher reserved the right to challenge and appeal the search and seizure of guns and marijuana from his truck and camper shell and to suppress statements. A commitment order was entered by the United States District Court for the Western District of Missouri, Southern Division, on July 5, 1989, and Mr. Boucher filed an appeal from the judgment and commitment order on July 13, 1989. A timely brief was filed in the Court of Appeals, and oral argument was permitted on February 15, 1990, before the Eighth Circuit Court of Appeals in St. Louis, Missouri. On July 27, 1990, the Eighth Circuit Court of Appeals affirmed the District Court's decision denying the motion to suppress. Mr. Boucher has filed a timely petition for writ of certiorari, pursuant to *Rule 13(1), Supreme Court Rules.* The appeal and jurisdiction of the Court of Appeals was filed pursuant to a conditional plea, *Federal Rules of Criminal Procedure, Rule 11(a)(2),* and *11(f);* *Federal Rules of Appellate Procedure, Rule 4(a), 4(b);* and 28 U.S.C. §1291. The Standard of Review is *de novo* and clearly erroneous.

Statement of the Facts

On November 14, 1988, Trooper Michael A. Cooper of the Missouri State Highway Patrol was on routine traffic patrol, heading west on Interstate Highway 44 in Laclede County, Missouri (App., p. 22). Boucher was travelling east in a pickup truck with a camper shell (App., p. 22). Cooper activated his radar unit and obtained a reading of 72 M.P.H., which was in excess of the State speed limit of 65 M.P.H., but was unable to obtain a lock on his radar reading (App., pp. 23, 31). Notwithstanding the failure to obtain a lock on his radar unit, Cooper activated his red lights and effected a stop for speeding (App., p. 23).

Boucher was travelling alone in his pickup truck. Cooper approached the pickup, and requested Boucher to produce his driver's license and registration for the pickup. Boucher produced a valid Arizona driver's license, which spelled his name Bocher. Boucher also produced a valid license plate and registration on the pickup from the state of Nevada, which spelled his name Boucher (App., p. 24). Boucher informed Cooper that he was a licensed private investigator in the state of Arizona (App., p. 41), and that he was on his way to Detroit, Michigan to visit relatives (App., pp. 56, 57). Cooper had approached the pickup from the driver's side window. He then requested Boucher to exit the pickup, and when Boucher exited the pickup, Cooper looked in the driver's side window and saw a handgun (App., p. 25). Through the window of the truck, Cooper observed the butt-end of a revolver on the seat, or in the seat, or in the crack of the seat (App., p. 42). Cooper stated the

gun was, "pushed back on the front seat and partially hidden by the top of the seat coming down," (App., p. 42). Cooper further revealed that, when he looked through the window of the truck, he saw the gun in clear view (App., p. 35), and that the gun was in plain view and nothing obstructed his view (App., p. 36). Cooper claimed he did not see the weapon initially while engaging Boucher in conversation as he was seated in the truck because Boucher's large, obese body obstructed his vision (App., p. 37).

Cooper stated it was his intention, after viewing the weapon through the window, to arrest Boucher for carrying a concealed weapon, in violation of Missouri State Law, R.S.Mo. §571.030 (App., pp. 36, 38). However, Cooper did not acknowledge the gun's presence, but conducted a pat-down search of Boucher and, finding no weapons on him, requested that Boucher accompany him to his patrol car. Boucher was in fact in "custody," having his liberty restrained and being under the direction and control of Cooper. Although this was a routine traffic violation, which would have only required a roadside investigation, it was Trooper Cooper's intention originally on the traffic violation to require Boucher to appear at the Sheriff's office (App., p. 35). Cooper acknowledged that he was restraining Boucher's liberty because he was an out-of-state driver who was being issued a citation for speeding (App., p. 36). According to Cooper, if Boucher did not follow Cooper's commands and directions while in the control of Cooper, Boucher would have been arrested for further crimes (App., p. 35).

Cooper readily admitted that he had intended to arrest Boucher for carrying a concealed weapon, decided not to *Mirandize* Boucher, but simply further questioned him to elicit a confession (App., p. 39). Cooper candidly admitted that his "ultimate intention" was to obtain a confession from Boucher, and that he was going to obtain this confession by a technique that he referred to as "back door interrogation" (App., p. 39). Cooper, after having placed Boucher in the back of his patrol car, stated that he was no longer interested simply in a traffic violation, but changed the questioning to inquire of other potential crimes that Boucher may have committed. Cooper now asked Boucher whether he had any weapons, drugs, or large quantities of cash in the pickup (App., p. 48). Boucher answered no to all three questions, and was further questioned about his background and activities by Cooper (App., p. 29). Cooper then asked Boucher, "do you mind if I take a look in your truck" (App., p. 29). Cooper stated that:

> My intentions for investigating further were to uncover any other facts that I might find, any other law violations such as stolen motor vehicles or anything else that might be there. (App., p. 47).

Cooper had written *Miranda* right waiver forms and consent to search forms in his vehicle, but did not present either to Boucher while conducting his back door interrogation and investigating "anything else that might be there" (App., p. 40). Boucher was not advised of any rights relative to his Constitutional right to refuse a "look" into his vehicle. Cooper then checked and learned that there was no other information indicating that Boucher was wanted by any law enforcement agency (App., pp. 32-34).

Cooper then requested Boucher exit the patrol car, and then performed a more thorough pat-down search of Boucher, and advised him of his *Miranda* rights (App., p. 26). Boucher was placed under arrest for carrying a concealed weapon (App., p. 19). The speeding citation was *nolle prosequi* in the State Court of Missouri (App., pp. 59, 60). The charge of carrying a concealed weapon was also dismissed by the State of Missouri (App., pp. 61, 62, 63). Cooper then proceeded to search the cab of the pickup, and located the revolver he had observed earlier (App., p. 27). After the discovery of the weapon in the cab, Boucher again indicated he was a private investigator, and that he carried the revolver for personal protection. Cooper then opened an unlocked briefcase, in which he found a second revolver (App., pp. 29, 30). Cooper then testified:

> My search was a probable cause search from the very beginning, and had he objected to my search, I would have continued the search based on probable cause for the weapons I had already found. (App., pp. 49-50).

As well, Cooper testified that he was not in fear of Boucher, and was not conducting a protective search (App., p. 50). Cooper firmly stated he never considered Boucher a threat to his safety until after he later discovered marijuana in the camper shell (App., p. 20). Cooper then went to the rear of the truck and opened the door and tailgate of the camper shell (App., p. 44). Cooper opened up the glass door to the camper shell, looked inside, and noticed a hump against the back of the cab portion (App., p. 44). The hump was covered by a

rubberized man-made material. Cooper climbed into the camper shell, moved aside Boucher's clothing, approached the hump, and pulled back on the bed liner and found four (4) wrapped bales (App., pp. 45, 46). Cooper cut into one of the bales with his knife, and discovered that the four (4) bales consisted of seventy-seven (77) pounds of marijuana.

In the District Court, Boucher filed motions to suppress concerning the arrest and seizure and his statements to Cooper. After a hearing and a supplemental hearing on the suppression issues, the District Court held that Boucher's statements made before he was advised of his *Miranda* rights were answers to questions incident to a routine traffic stop, and were admissible. The District Court also found that the discovery of the revolver and the drug notes authorized a complete search of Boucher's vehicle, and all items found pursuant to that search were admissible. Subsequently, Appellant entered a conditional plea, pursuant to *Federal Rules of Criminal Procedure, Rule 11(a)(2)*, and *11(f)*. Boucher pled to the entire indictment, Counts 1 and 2. Boucher has alleged that no factual basis was established for Count 2, in that he did not use the guns in violation of 18 U.S.C. §924(c). Boucher also alleged in the Appellate Court that he was not properly advised by the District Court as to his Constitutional rights, or that a factual basis was established for the plea.

REASONS FOR GRANTING THE WRIT

I

THE DISTRICT COURT ERRED IN HOLDING THAT A MISSOURI STATE TROOPER'S PLAIN VIEW OF A GUN OBSERVED DURING THE COURSE OF A ROUTINE TRAFFIC STOP CONSTITUTED PROBABLE CAUSE TO ARREST THE PETITIONER FOR CARRYING A CONCEALED WEAPON AND TO SEARCH HIS TRUCK.

A. Radar - Pretext

At the motion to suppress hearing, Boucher challenged the testimony of Cooper and contended that the traffic stop was a ruse or pretext for Trooper Cooper's desire and vigilance in apprehending drug carriers who may wish to use the Missouri highways. Cooper admitted that he originally saw the defendant travelling the opposite direction, and thought Boucher "appeared to be speeding." He was unable to get a proper radar lock, but obtained a tentative reading of 72 M.P.H.: the speed limit in the area was 65 M.P.H. Boucher was not committing any other traffic violations, and denied that he was speeding.

The purported speeding violation was nothing more than a coverup to ferret out the transportation of drugs and other contraband through the state of Missouri from western states, such as Arizona and Nevada. To demonstrate the spuriousness of the speeding violation, it was later *nolle prosequi* by the State of Missouri.

Boucher has clearly demonstrated that the speeding charge was a pretextual act by Cooper to further his real purpose to search for drugs. *State v. Lorenzo*, 743 S.W.2d 529 (Mo.App. 1987); *State v. Moody*, 443 S.W.2d 802 (Mo. 1969). Under Missouri law, Cooper had no right to use the "speeding" and "concealed weapons" as a pretextual act to allow him to illegally search for drug trafficking, stolen motor vehicles, or, as he stated, "anything else that might be there."

B. No Concealment of Gun - No Probable Cause

After Cooper ordered Boucher out of the truck, he noticed the butt of a gun either on the seat, in the seat, or in the crack of the seat. He was unable to precisely delineate the position of the gun, but conceded that the butt of the gun was in plain, unobstructed view, once Boucher had exited the vehicle. The Court of Appeals indicates on page 5 of its opinion, "the gun was not in plain view prior to this time because Boucher was sitting on it, and it was therefore concealed." Testimony revealed that Boucher is a 260 pound obese man, who was sitting in his truck with the gun alongside of him, and not strikingly visible from Trooper Cooper's vantage point at the driver's side. Cooper testified:

> The butt was sticking out of the crack in the seat, the crack is similar to a regular seat, and the gun was just shoved right down in the crack with about three or four inches of the gun sticking out of the crack, the handle portion. (App., p. 54)

Appellate counsel at oral argument inquired rhetorically of the court as to how Cooper could state that the gun

was underneath Boucher, when in fact he claimed he never saw the gun. It is incredible to believe that Boucher was suspended three or four inches above the seat, permitting the gun to extend that distance below his body. Cooper didn't observe this impossible feat. Cooper learned that the gun was fully loaded and had six live rounds in the chamber (App., p. 28). It is likewise incredible to believe that Boucher would allow himself to sit upon a gun that contained a live round in every chamber, and subject himself to undue harm, risk and death. Simply because Boucher was obese doesn't mean he was stupid. Boucher was a licensed private investigator, was familiar with guns, and had every reason to believe that, if he sat on that gun, that it could have easily discharged, causing serious bodily injury or death to him. Appellate counsel demonstrated in a video transcription the obvious scenario depicting the precise location of the weapon, to wit: alongside of Boucher. The video clearly demonstrated that the weapon could be seen from other vantage points through the side driver's window and front window, and, more importantly, in plain, clear view from the passenger's side portion of the vehicle. This undoubtedly became extremely important in the Appellate Court's erroneous interpretation of Missouri law. The Appellate Court stated on page 5 of its opinion:

> Even if Boucher had not been sitting directly on top of the weapon, under Missouri law, a weapon is concealed when it is not visible by ordinary observation, even where it is visible from one particular vantage point. *State v. Crews*, 722 S.W.2nd 653, 654 (Mo.Ct.App. 1987).

The Court of Appeals has totally misinterpreted Missouri state law. In *State v. Crews, supra*, the Court stated:

> Whether a weapon is concealed is determined by whether it is discernable by ordinary observation BUT IT IS NOT CONCEALED SIMPLY BECAUSE IT CANNOT BE SEEN FROM A SINGLE VANTAGE POINT IF IT CAN BE CLEARLY SEEN FROM OTHER POSITIONS. However the weapon MAY be concealed if it is discernable only from one particular vantage point. 722 S.W.2d at 654.

The Court of Appeals holds that a weapon is considered concealed under Missouri law when it cannot be seen by ordinary observation, although visible from one particular vantage point. *State v. Crews, supra*, does not state what the Court of Appeals has reasoned. The Missouri Court of Appeals holds that a weapon may be concealed only if it is discernible from one particular vantage point, to the exclusion of all other vantage points. There is no testimony that Cooper could not see the weapon from other vantage points, only that he was unable to see the weapon when he first came in contact with Boucher from Cooper's vantage point along the driver's side window. Further, in *State v. Crews, supra*, the Missouri Appellate Court held that the weapon was concealed because the police officer could not have seen the weapon under any circumstances, since it was concealed in the right-hand pocket of the defendant's coat. The facts in the case at bar do not suggest this scenario. The facts in the case at bar do not suggest that Cooper could not have seen the weapon under ordinary observation from other positions,

and, in fact, the position and location of the weapon suggested by the defendant requires a contrary conclusion.

Boucher contends that a partially concealed weapon is not a concealed weapon. *State v. Payne*, 654 S.W.2d 139 (Mo.App. 1983); *State v. Bordeau*, 337 S.W.2d 47 (Mo.Sup. 1960). In *State v. Cavin*, 555 S.W.2d 653 (Mo.App. 1977), it was stated at page 654:

> A weapon is not concealed simply because it is not discernible from a single vantage point if it is clearly discernible from other positions. (Police officer had an opportunity to see all sides of defendants' bodies and hands, and did not see the pistols.)

If, after movement of a portion of the body, the weapon is viewable in plain sight, the weapon is not considered concealed. *State v. Williams*, 481 S.W.2d 1 (Mo.S.Ct. 1972). No evidence was presented to indicate that the weapon was not discernible from other vantage points. While it is true that carrying a concealed weapon is a violation of Missouri law, in this case Boucher was not concealing a weapon, and, therefore, was not in violation of Missouri law. Missouri law is stated as follows:

> R.S.Mo. §571.030 UNLAWFUL USE OF WEAPONS, EXCEPTIONS - PENALTIES
>
> 1. A person commits the crime of unlawful use of weapons if he knowingly: (1) carries concealed upon or about his person...a firearm. (App., p. 58)

It is clear that Cooper never saw the weapon until Boucher exited the vehicle. He was not in a position to state whether or not the weapon was discernible from other vantage points to the exclusion of only one vantage point. Therefore, Missouri law makes it very clear that Boucher was not concealing a weapon. Therefore, Trooper Cooper had no probable cause to arrest Boucher for carrying a concealed weapon, and any evidence derived from the illegal arrest (guns and marijuana) must be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). The Appellate Court has totally misinterpreted Missouri law, and, without this improper determination, Boucher's motion to suppress would have been granted, and there would have been no violation of his Fourth and Fourteenth Amendment rights to the United States Constitution.

C. Travelling Peaceably Through the State

The Eighth Circuit Court of Appeals has not even addressed this issue raised by Boucher. Boucher was driving on an Arizona driver's license with Nevada plates. He indicated to Cooper that he was proceeding through the state of Missouri to Detroit, Michigan, to visit his family. The Missouri statute relating to carrying concealed weapons states as follows:

> R.S.Mo. §571.030
> Subdivision (1) or Subsection (1) of this section does not apply...when the actor is travelling in continuous journey peaceably through this state. (App., p. 58)

Boucher was on an interstate highway, and Cooper had no reasonable basis to believe that Boucher was a Missouri person driving intrastate. There was, however, more than ample reason to believe that Boucher was driving continuously, peaceably through Missouri, in accordance with the exception guidelines of R.S.Mo. §571.030(3). Cooper testified that he was going to bring Boucher to the local Sheriff's office because Boucher was an out-of-state person, who needed to post an appearance bond at the Sheriff's office. Pursuant to *State v. Mason*, 571 S.W.2d 246 (Mo. 1978), a violation of this section of the Missouri statute is subject to the doctrine of plain error. *State v. Mason*, 571 S.W.2d at 248, 249. Boucher was a private investigator, and was permitted to possess weapons. He was travelling in a continuous journey peaceably through the state of Missouri, and, therefore, the exemption of R.S.Mo. §571.030(3) was applicable, and there was no basis for Cooper to determine that Boucher was in possession of a concealed weapon. In fact, the charge of carrying a concealed weapon was dismissed by the state of Missouri, further demonstrating the invalidity of Boucher's arrest (App., pp. 61, 62, 63). Cooper made it clear that he furthered his search of the vehicle because he determined that Boucher was carrying a concealed weapon. Cooper's foundation for the location of the weapons and the subsequent search no longer existed when Missouri law determined that the weapon in the crack of the seat was not concealed. Cooper made it clear that it was the discernment of the weapons that caused him to proceed with his alleged probable cause search. If the probable cause is removed, there would be no reason for Cooper to continue his illegal search and discovery of marijuana.

II

THE TRIAL COURT ERRED IN REFUSING TO DECLARE PETITIONER'S STATEMENTS INADMISSIBLE AT A TIME WHEN PETITIONER'S FREEDOM HAD BEEN DEPRIVED IN A SIGNIFICANT WAY.

Boucher contends that he was interrogated by Cooper without the benefit of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Boucher was entitled to his *Miranda* rights when he was either taken into custody by Cooper, or "otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona, supra.* Prior to being *Mirandized*, Cooper interrogated Boucher on subjects totally unrelated to the alleged routine traffic stop. Cooper questioned Boucher regarding weapons, drugs and cash, as well as his consent to search the truck, prior to the admonition of the *Miranda* rights, and, therefore, any statements made by Boucher were clearly tainted, and, therefore, cannot be the subject of any search of Boucher's vehicle. The Eighth Circuit Court of Appeals simply decided that factually Boucher was not "in custody" when he was being questioned by Cooper, and, therefore, there was no necessity to administer the *Miranda* rights. More importantly, the Appellate Court simply does not address the other prong triggering off the *Miranda* rights, which is when a defendant's freedom of action is deprived in a significant way. In the case at bar, Boucher was deprived of his freedom of action in a significant way.

Boucher was required to exit his vehicle. Boucher was questioned and subject to a cursory pat-down by

Cooper. Boucher was then required to return to the area of Cooper's vehicle. Boucher was then requested to leave the roadside public area, and enter the private area of Cooper's vehicle. Boucher was placed in the rear seat portion of Cooper's vehicle. Boucher was then required to remain in the vehicle and answer questions that had absolutely nothing to do with the alleged speeding violation. Boucher was questioned about his knowledge of drugs in his vehicle, large sums of cash, and, more importantly, whether he was carrying any weapons. Cooper obviously withheld information that he knew that Boucher had a weapon in the vehicle that he had seen in plain view. Cooper described this technique as "back door interrogation." According to the government's position, Boucher knew that he had a weapon on the front seat of his pickup, a weapon in a briefcase on the passenger floorboard of his pickup, and that he had 77 pounds of marijuana hidden in the camper shell connected to his pickup. As well, it was clear that Boucher was not free to go, as according to Cooper it was necessary, because he was an out-of-state person, to present himself to the Sheriff's office and post a bond on the traffic citation. It is Boucher's contention that he was clearly in custody, but at the very least he had been deprived of his freedom of action in a significant way.

The Appellate Court's conclusion that a reasonable person in Boucher's position would not have considered Cooper's questions in the patrol car a custodial interrogation is not well founded and supported by case law. It is difficult to perceive how the Appellate Court, as did the District Court, could make the quantum leap from allowing background questions incidental to the processing of a routine traffic stop to allowing questions

and interrogation regarding knowledge of drugs, large sums of cash, and weapons. A reasonable person in Boucher's position would clearly have believed that the officer was not simply interested in detaining him for a traffic stop, but had some reasonable basis to believe that he had committed other crimes. As a result, Boucher had an absolute right to believe that he was in custody, or that his freedom of action was deprived in a significant way. In addition, while the Appellate Court places great emphasis on *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), this case actually supports Boucher's contention. The Court of Appeals makes short shrift out of the fact that Boucher was placed into the patrol car by Trooper Cooper. However, it is clear that in *Berkemer v. McCarty, supra*, this Court was discussing roadside questioning. In the case at bar, Cooper, by instructing Boucher to get into his vehicle, was no longer conducting roadside questioning, but had removed Boucher from exposure to public view by placing him in Cooper's vehicle. This Court, in *Berkemer v. McCarty*, 468 U.S. at 438, stated:

> Perhaps most importantly that a typical traffic stop is public at least to some degree, passerby, on foot, on in other cars, witnessed interaction of officer and motorist. This exposure to public view both reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements, and diminished the motorist's fear that 'if he does not cooperate, he will be subject to abuse.'

In the case at bar, assuming *arguendo* that the weapon on the seat was concealed, Cooper was well aware that Boucher was committing a criminal offense. Under these circumstances, Cooper had a direct substantial interest in attempting to induce Boucher to incriminate himself. In *Berkemer v. McCarty*, 468 U.S. at 433, it was held:

> Similar incentives are likely to be present when a person is arrested for a minor offense but the police suspect that a more serious crime may have been committed.

It is not necessary that the detained motorist be arrested before he is administered *Miranda* warnings when the traffic offense is no longer the purpose of the detention and the questioning. *United States v. Reliable Transfer Company*, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975). In *United States v. Ibarra*, 725 F.Supp. 1195 (D.Wyo. 1989), the defendant was stopped by a police officer for investigation of driving while intoxicated. The officer learned that Ibarra's license had been suspended, and required Ibarra post a bond. The officer became suspicious, and asked Ibarra if the vehicle contained any "weapons, large amounts of money, or controlled substances," to which Ibarra answered "no." The officer then asked if he could "look at the contents" of Ibarra's car. Ibarra agreed. The officer later searched the vehicle, and discovered cocaine. Ibarra moved to suppress the evidence on a violation of his Fourth Amendment, in that the initial stop was unconstitutionally pretextual. The District Court in *United States v. Ibarra, supra*, held:

> The scope of a police officer's actions during a traffic stop is limited generally to asking the driver for his license and vehicle registration, running an NCIC check, and issuing a warning or citation. *United States v. Guzman*, 864 F.2d 1512, 1519 (10th Cir. 1988).

In the case at bar, Boucher had produced a valid driver's license and proof that he was entitled to operate the vehicle. Cooper stated that he had no previous knowledge that Boucher was committing any violations regarding weapons, large amounts of money, or controlled substances. The *Ibarra* District Court held:

> A routine traffic stop for a minor traffic infraction may be UNconstitutional, however, where the stop is a pretext for investigating more serious criminal conduct for which the officer has neither reasonable suspicion nor probable cause to justify a detention. (725 F.Supp. at 1198)

Obviously the Wyoming State Police was schooled with the same language of the Missouri Troopers. The Court of Appeals opinion sanctions a police officer's back door interrogation of a defendant, in violation of his *Miranda* rights. While the police have an absolute right to ferret out crime, they cannot do so in violation of traditional notions of fair play and justice, and basic Constitutional rights. The ruling of the Eighth Circuit Court of Appeals is an unbridled license for police officers to stop people for routine traffic violations, and question them about more serious unrelated crimes without advising these

individuals of their basic Constitutional protections pursuant to the Fourth, Fifth and Sixth Amendments of the United States Constitution. The evidence in *United States v. Ibarra, supra*, was suppressed, as it should have been in the case at bar.

Boucher's no answer to his knowledge of any weapons or drugs or large amounts of cash in his vehicle, without the benefit of *Miranda* rights, should not be used to bootstrap Cooper's right to search Boucher's pickup. The "exculpatory no" doctrine also provides for the suppression of such statements by Boucher, who merely supplied a negative and exculpatory response to Cooper's questions. *United States v. Longbehn*, 850 F.2d 450, 452 (8th Cir. 1988). Interrogation includes direct questioning or any practice that police should know is reasonably likely to evoke an incriminating response from a suspect. *Rhode Island v. Innis*, 446 U.S. 21, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980); *United States v. Henry*, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980). Boucher had every reason to believe, since he had weapons, drugs, and sums of money in his vehicle, that any questioning relating to those areas would likely incriminate Boucher. If he answered in the negative, he would be lying and giving false information to a police officer. If he answered in the affirmative, he would admit to crimes and would be subject to further prosecution. It is unconscionable that the Appellate Court could dismiss Boucher's argument simply because Boucher was unaware of Cooper's intentions at the time. Anyone in Boucher's shoes obviously knew he was a suspect when the questioning changed from simple background material regarding driver's license and vehicle registration to knowledge or possession of drugs, weapons and cash. If nothing else, Cooper

knew that Boucher was a suspect as to the concealed weapon, and also knew that by questioning him without the benefit of *Miranda* rights, that the questions asked by Cooper were reasonably likely to elicit an incriminating response from Boucher, in violation of *Rhode Island v. Innis, supra. State v. Dorey*, 786 P.2d 1288 (Or.App. 1990).

The decision of the Eighth Circuit Court of Appeals was authored by the Honorable Circuit Judge McMillian on July 27, 1990. However, in the same Eighth Circuit Court of Appeals, another opinion, authored by this same Appellate court judge, Circuit Judge McMillian, caused an opinion to be rendered directly contrary to the position taken by Judge McMillian in the instant case. It is Boucher's contention that there is a direct conflict not only within the circuits, but within the very circuit and within the very judge rendering both opinions. In *United States of America v. Derrick Lance Blackman*, 897 F.2d 309 (8th Cir. 1990), a police officer approached the passenger's side of a taxi, and began questioning Blackman about where he was going and whether he had any luggage. Blackman denied having any luggage, and refused to consent to a search. Blackman moved to suppress these statements in the District Court, in violation of his *Miranda* rights. Judge McMillian, in *United States of America v. Blackman, supra*, held that Blackman was in custody, and was entitled to *Miranda* rights, and, therefore, the District Court erred in refusing to suppress the statements. The Court felt, "a reasonable person in Blackman's shoes would not have felt free to leave the scene, and numerous officers were present at the time of questioning to arrest Blackman for transporting the drugs the police firmly believed to be in

the trunk of the taxi." Blackman had no information that the police had information from an informant regarding his transportation of drugs, and yet Judge McMillian held a reasonable person in Blackman's shoes would not have felt free to leave the scene. In the instant case, any person in Boucher's shoes would certainly not have felt free to leave the scene. The police officer made that clear, and anyone reading the facts in this case could not come to any other conclusion. Therefore, Boucher, as Blackman, was entitled to his *Miranda* rights, and the failure of Cooper to give him those rights must allow for the suppression for all evidence of weapons, and particularly marijuana, introduced against Boucher, thereby requiring his case to be dismissed.

III

THE SCOPE OF THE CONSENT TO "LOOK" WAS INVOLUNTARY AND FAR EXCEEDED BY THE FULL TRUCK SEARCH CONDUCTED BY TROOPER COOPER: THEREFORE ALL EVIDENCE SEIZED AS A RESULT MUST BE SUPPRESSED.

It is incumbent upon the government to prove by clear and positive evidence that the consent was made knowingly, intelligently, and voluntarily. *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938); *Bumper v. North Carolina*, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968). Boucher was asked if he minded if Trooper Cooper took a "look" in his truck. Boucher did not mind a "look" but did mind a search. Boucher consented to a "look" but not to a search. Webster's Ninth New Collegiate Dictionary defines "look" as:

> ...to ascertain by the use of one's eyes; to exercise the power of vision open; to bring into place or condition by the exercise of the power of vision; to express by the eyes or facial expression; to direct the eyes.

Black's Law Dictionary (Fourth Edition) defines "search" as:

> ...prying into hidden places for that which is concealed.

Look, by definition, does not encompass a search. If Cooper wanted to search, he should have asked for a search, not a look. Boucher never consented to a search, but only to a look. If one is to assume the government's position and the Eighth Circuit Court of Appeals', that search really means look, then Boucher's consent to search was not made knowingly, intelligently, and voluntarily. *Johnson v. Zerbst, supra.* The Seventh Circuit Court of Appeals, in *United States v. Dichiarinte*, 445 F.2d 126 (7th Cir. 1971) stated:

> The defendant's consent may limit the extent or scope of a warrantless search in the same way that the specifications of a warrant limit a search pursuant to that warrant. 445 F.2d at 129, 130.

In the case at bar, it is clear that Boucher only consented to a look, not to a search. The statement "look" limited the scope of the search, and Cooper performed a much broader search than was consented to by Boucher. *United States v. Milian-Rodriquez*, 759 F.2d 1558, 1563

(11th Cir. 1985); *United States v. Nasworthy*, 710 F.Supp. 1353 (S.D.Fla. 1989).

The state of Missouri has had an opportunity to address this very question in *State v. Lorenzo, supra.* In *State v. Lorenzo,* another Missouri trooper asked the question if he could look inside the van. The driver permitted the look, and the Appellate Court held that the look did not ripen into a search of the van or its contents, and thereby suppressed the marijuana found in the van. The Missouri Court of Appeals stated:

> Consent to search could not be considered fully and intelligently given when a police officer misleads the person from whom consent is sought as to his intentions. *Graves v. Beto,* 424 F.2d 524 (5th Cir. 1970); *State v. Lorenzo,* 743 S.W.2d at 532.

Under Missouri law, Boucher did not give consent to search his vehicle, and Cooper, presumed to know the law in Missouri, did not have valid consent to search Boucher's pickup and camper shell. The search clearly exceeded the scope of the consent given, and was not voluntary, and, as a result, any evidence seized must be suppressed. *Wong Sun v. United States, supra.*

IV

APPELLANT'S PLEA OF GUILTY TO COUNT 2 OF THE INDICTMENT CHARGING HIM WITH VIOLATING 18 U.S.C. §924(c) MUST BE VACATED BECAUSE NO FACTUAL BASIS AND NO RELATIONSHIP BETWEEN THE GUN AND THE UNDERLYING OFFENSE WAS ESTABLISHED.

The indictment alleged that Boucher "used" a firearm in relation to Count 1 charging him with possession with the intent to distribute marijuana, in violation of 21 U.S.C. §841(a)(1). One weapon was found on or in the seat of Boucher's truck at the time of his arrest (App., p. 42). The second gun was discovered in a closed briefcase on the passenger's side floorboard in the truck (App., pp. 29, 30). It was established at the time of Boucher's arrest that he was peaceably travelling through the state of Missouri with a valid Arizona driver's license and legitimate Nevada license plates on his vehicle. Additional evidence indicated that Boucher possessed these weapons during the regular course and scope of his employment as a private investigator in the state of Arizona. Arizona permits private investigators to possess weapons. It is clear that any time Boucher would be stopped driving his vehicle, he was likely to be in possession of weapons as part of his employment. The guns were never established to be incidental to Boucher's admitted possession with the intent to distribute marijuana. If the District Court made inquiry as to this count, Boucher would have honestly had to indicate that he did not possess the guns in connection or in relation to

the possession of marijuana with the intent to distribute. He would have had to admit that he possessed the guns in the normal course and scope of his employment as a private investigator, thereby negating any factual basis for this plea. The government and the District Court did not establish this factual basis, and, therefore, Boucher's plea to Count 2, 18 U.S.C. §924(c) must be vacated.

Further, in order to establish a factual basis under 18 U.S.C. §924(c), the government must prove the essential element of a relation between the gun and the underlying offense. *United States v. Stewart*, 770 F.2d 538 (9th Cir. 1985). The government must prove that Boucher did some act by which his ability to control the guns was manifest and implemented. Mere transportation of a gun is not within the purview of 18 U.S.C. §924(c). There was no evidence established that Boucher was using the weapons in the capacity of transporting the marijuana, or that he used them when he had a chance at the time of the initial stop by Cooper. As well, 18 U.S.C. §924(c) required more than mere possession of a firearm. It required a nexus between the firearm and the underlying offense. Concomitantly, Boucher's plea must be vacated on these grounds as well.

The government has alleged numerous cases supporting its position that mere transportation is sufficient to satisfy the requirements of 18 U.S.C. §924(c). The government's cases can be categorized under the "fortress theory," which holds that the "sheer volume of weapons and drugs make reasonable the inference that the weapons involved were carried in relation to the predicate drug offense, since they increase the likelihood the drug offense will succeed."

United States v. Robinson, 857 F.2d 1006 (5th Cir. 1988); *United States v. Matra*, 841 F.2d 837 (8th Cir. 1988). The facts in the case at bar do not even remotely resemble the facts in *United States v. Matra, supra*, and *United States v. Robinson, supra*. Boucher had only five hundred dollars in his possession, and two handguns that were both in holsters, one in a closed briefcase, the other in open view on the seat next to him (App., p. 18). No relationship or nexus between the guns and the marijuana was ever established by the government, nor could it be established by the facts known to Cooper and presented by Boucher, or that would have been presented by Boucher if inquired by the District Court. All the cases by the government further establish a nexus or connection between the weapons and drugs, unlike the case at bar. Pursuant to *United States v. Raborn*, 872 F.2d 589 (5th Cir. 1989), "in relation to language of the statute means something more than strategic proximity of drugs and firearms, as envisioned by Congress." Petitioner also asserts that the various circuits have entered different rulings on this subject, and that this Court should consider deciding this case and making a ruling that would be consistent for all the circuits.

The Eighth Circuit Court of Appeals, as well as the government, has failed to address the problem that there were two weapons charged in Count 1, as a violation to 18 U.S.C. §924(c). Therefore, it is impossible to determine for which weapon Boucher stands convicted under 18 U.S.C. §924(c). In *United States v. Theodoropoulos*, 866 F.2d 587 (3rd Cir. 1989), the defendant was convicted under 18 U.S.C. §924(c) of "using" several guns. The jury's verdict did not delineate which of the guns had been "used," and, therefore, the Court of

Appeals stated that, unless all the weapons were "used," the verdict cannot be upheld. In *United States v. Theodoropoulos, supra*, the government, as in the case at bar, argued that, as long as the firearms were "available for use," 18 U.S.C. §924(c) is satisfied. In the case at bar, the government used as its factual basis "the guns were available." (App., p. 52). The Third Circuit Court of Appeals in *Theodoropoulos* stated:

> We cannot agree with the government that the mere availability of a firearm satisfies 18 U.S.C. §924(c). 866 F.2d at 597.

Therefore, since the indictment is improperly drawn, and incorporates both weapons, the government must establish a factual basis for both weapons, which it has not, and cannot do under the facts in the case at bar. Concomitantly, the plea and the sentence as to Count 2 must be vacated pursuant to *United States v. Theodoropoulos, supra.*

CONCLUSION

The petitioner respectfully prays this Honorable Court for a writ of certiorari be granted to allow for review of the Constitutional issues, providing petitioner with a new trial commensurate with his Fourth, Fifth, Sixth, and Fourteenth Amendment rights to the United States Constitution. Petitioner requests that this Court reverse the District Court and the Eighth Circuit Court of Appeals orders denying his motion to suppress physical evidence and statements, and release defendant from any further obligations pursuant to this case. In the alternative, petitioner requests that his plea and sentence to

Count 2 be vacated, for the reasons stated herein, and he be permitted to plead anew in the District Court to this Count. Petitioner believes that, notwithstanding the numerous Constitutional issues presented, that the Eighth Circuit Court of Appeals has misinterpreted Missouri law, has created a conflict within its own circuit and own panel on the right to search petitioner's vehicle and to obtain improper incriminating statements, and to resolve an issue created by all the Circuit Court of Appeals on the relationship between weapons and transportation of marijuana.

RESPECTFULLY SUBMITTED this 21st day of September, 1990.

STANTON BLOOM, P.C.

Stanton Bloom

Stanton Bloom

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	No. 88-03479-
v.	)	01-CR-S-2
	)	
GERALD VICTOR BOUCHER,	)	
	)	
Defendant.	)	

ORDER DENYING
DEFENDANT'S MOTION TO SUPPRESS

The defendant in this case is charged by a two-count indictment. The first Count charges possession of 77 pounds of marijuana with intent to distribute and the second charges that the defendant did knowingly and intentionally use firearms during and in relation to the possession with intent to distribute marijuana as alleged in Count I. The defendant's motion is to suppress the 77 pounds of marijuana which are the basis for Count I of the indictment, and the two revolvers which are the basis for Count II of the indictment.

The Court held a full evidentiary hearing followed by a supplemental evidentiary hearing and from all the evidence finds the following facts. The Court also had the transcript of the detention hearing in this case (at which the defendant was represented by employed counsel).

The defendant was driving a Chevrolet pickup truck equipped with a camper back on U.S. I-44 in Laclede County, Missouri, and was observed by a highway patrolman driving at an excessive speed. The patrolman stopped the car which only had one occupant (the driver, the defendant in this case), approached the car, and asked to see the driver's license. The driver's license was an Arizona license and the last name was spelled "B-o-c-h-e-r." The license on the car was a Nevada license and the driver produced the registration receipt for the car and the last name was spelled "B-o-u-c-h-e-r." The patrolman asked the driver to step out of the car and patted him down for weapons and, finding none, asked him to sit in the patrol car. After the driver had gotten out of the car, the patrolman observed the butt end of a revolver, which had been pushed in between the front seat and the back of the front seat on the driver's side, and which had been concealed from view by the driver's body until he left the car. The patrolman questioned the driver as he was writing out the speeding ticket and asked the driver if he had any weapons, drugs or large quantities of cash in the vehicle and he responded that he had no weapons, no drugs or no large quantities of cash. The patrolman stated that after writing out the ticket, he told the driver he was under arrest and asked the driver for permission to search the vehicle. The exact words he used were: "Do you mind if I take a look in your

truck?" The driver said all right and then the driver and the patrolman got out of the patrol vehicle and looked over the pickup truck. Before they got there, the patrolman had the defendant spread-eagled on the hood of the car and searched him thoroughly for a weapon but found none. They then went back to the pickup and the patrolman pulled the revolver out from behind the front seat where he observed and found a fully loaded .22 revolver, loaded with hollowpoint bullets. The patrolman then observed a briefcase on the front seat immediately to the right of where the defendant's right leg had been while driving. The briefcase was unlocked and the patrolman opened it and found a Walther .380 calibre automatic, also fully loaded with hollowpoint bullets, with one bullet in the chamber. The safety was off on this gun and it was fully cocked. The patrolman went to the back of the camper and opened the door in back of the pickup truck so that he could enter the camper. He immediately saw fresh coffee scattered on the floor of the pickup, a half empty bottle of ammonia and an aerosol air freshener can. From past experience, he knew that all of these items were used to mask the odor of marijuana. The bed of the pickup was covered with a "bedliner" which was tailored to fit the bed of the pickup and to lay flat on that surface. However, at the end of the bed nearest the cab, the bedliner was elevated some 18 inches above the bed of the truck. The patrolman lifted the bedliner and found four bales tightly wrapped in plastic of what turned out to be compressed marijuana buds. The evidence was that marijuana buds are more potent and therefore more valuable than regular marijuana.

The trooper found $550.00 in the defendant's pockets and five $100.00 bills in an empty aspirin tin, into which had been folded and compressed and which was in a blue bag in the camper.

The trooper also testified that "the judge" in Laclede County required that all out-of-state drivers who were issued traffic citations should be brought directly to the jail and then before the judge immediately. It is quite obvious to this Court that the seizure of the .22 revolver which was partially in plain view after the defendant vacated the car, the seizure of the Walther automatic which was fully loaded and cocked, in an unlocked briefcase near the defendant's right hand was an unquestionably valid search and seizure under all the circumstances. In this connection, the trooper found a number of "drug notes" in the unlocked briefcase, the search of which was fully justified after the discovery of the first loaded revolver.

At that point, the trooper could have taken the defendant into the county seat, Lebanon, Missouri, to the Highway Patrol office or directly to the county jail. Although there was no direct evidence to this point, the Court knows from long experience (39 1.2 years as a trial court judge in Missouri), and will take judicial notice, that an officer of the Highway Patrol would inventory the defendant's truck at that point before locking it up for safekeeping. This would lead to the inevitable discovery of marijuana. In the case of *Nix v. Williams*, 467 U.S. 431 (1984) the Supreme Court affirmed the inevitable discovery rule exception to the exclusionary rule and this inevitable discovery rule applies in this case.

The defendant makes a point that there was no consent to search the camper in which the marijuana was discovered because the consent was only given to the question by the patrolman, "do you mind if I look in your truck?" The defendant cites a number of cases inferring an answer to similar requests has been held not to authorize a complete search, but the Court feels that this question is unimportant in this case, since the weapons had already been discovered as well as drug notes. When the trooper "looked" in the camper, he immediately saw in plain sight evidence of odor masking agencies which are commonly used by drivers to conceal the pungent odor of marijuana. The trooper testified and it was not denied that he gave the standard Miranda warning to the defendant immediately after placing him under arrest and that the defendant stated he understood it and was very cooperative and answered questions thereafter until the trooper discovered the sealed bales of marijuana and questioned him if that was marijuana at which time the defendant refused to answer any other questions. The Court will therefore deny the motion to suppress as to all statements made by the defendant. The statements before the Miranda warning were simply answers to questions asked to fill out the traffic citation and the statements made after the Miranda warning were obviously made with a full understanding of the defendant's right to remain silent. In view of the above findings of the Court, the defendant's motion to suppress is hereby denied in all respects.

/s/ William R. Collinson
William R. Collinson
United States Senior District Judge

May 1, 1989

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2203

United States of America,	*	
Appellee,	*	Appeal from the United States
	*	District Court for the
v.	*	Western District of Missouri
Gerald Victor Boucher,	*	
Appellant.	*	

Submitted: February 15, 1990
Filed: July 27, 1990

Before McMILLIAN and FAGG, Circuit Judges, and STROM,* District Judge.

McMILLIAN, Circuit Judge.

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*The Honorable Lyle E. Strom, Chief Judge, United States District Court for the District of Nebraska, sitting by designation.

Gerald Victor Boucher appeals from a final judgment entered in the District Court[1] for the Western District of Missouri. Boucher pled guilty to one count of possession of marijuana with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), and one count of use of a firearm "during and in relation to" the drug offense, in violation of 18 U.S.C. § 924(c). Boucher reserved the right to appeal the denial of his pretrial motions to suppress. The district court sentenced Boucher to imprisonment for 21 months on the drug charge and 5 years on the firearms charge, to be served consecutively, 5 years supervised release, and a $100 special assessment. For reversal, Boucher argues that the district court erred in denying his motion to suppress evidence seized as a result of his arrest following a routine traffic stop. Boucher asserts that: (1) the traffic stop for speeding was a pretext to stop and search his vehicle, (2) the presence of a gun in plain view did not give the officer probable cause for the search, (3) the district court erred in allowing the admission of pre-*Miranda* statements to justify the search, (4) the scope of the search exceeded the scope of Boucher's consent, (5) neither the inventory search rule nor the principle of inevitable discovery apply, and (6) there was no factual basis for Boucher's guilty plea to the weapons charge. For the reasons discussed below, we affirm the judgment of the district court.

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[1] The Honorable William R. Collinson, Senior United States District Judge for the Western District of Missouri.

I. Facts

On November 14, 1988, Trooper Michael A. Cooper of the Missouri State Highway Patrol was on routine traffic patrol heading west on Interstate Highway 44 in Laclede County, Missouri. Boucher was traveling east in a pickup truck with a camper shell. Cooper testified that from his experience, Boucher appeared to be exceeding the state speed limit of 65 miles per hour. Cooper activated his radar unit in his patrol car, directed it toward Boucher's pickup, and obtained a reading of 72 miles per hour, which was in excess of the speed limit. Cooper was unable to obtain a "lock" on his radar reading due to interference from a nearby overpass, but he activated his red lights and effected a stop for speeding without the "lock."

Boucher was alone in his pickup. Cooper approached the pickup and requested Boucher to produce his driver's license and registration for the pickup. Cooper observed that Boucher had an Arizona driver's license which spelled his name B-O-C-H-E-R, but his license plates and registration were from Nevada and his registration spelled his name B-O-U-C-H-E-R. At that point, Cooper asked Boucher to step out of the pickup. Through the window of the truck, Cooper observed the butt end of a revolver sticking out between the seat and the seat-back. The revolver had been concealed by Boucher's body when he was seated in the pickup. Cooper did not acknowledge the gun's presence, but conducted a pat down search of Boucher and, finding no weapons on him, asked Boucher to sit in the patrol car. In the patrol car, Cooper proceeded to issue Boucher a traffic ticket for speeding. While writing the ticket,

Cooper asked Boucher whether he had any weapons, drugs, or large quantities of cash in the pickup. Boucher was unaware that Cooper had seen the handgun in the front seat of the pickup and denied the presence of those items in the vehicle. Cooper then asked Boucher if he could have a look in the pickup and Boucher consented.

Upon exiting the patrol car, Cooper performed a more thorough pat down search of Boucher and advised him of his *Miranda* rights. Cooper proceeded to search the cab of the pickup and located the revolver he had observed earlier. The revolver was loaded with hollow-point bullets. At that point Boucher stated that he was a private investigator and he carried the revolver for personal protection. Cooper then opened an unlocked briefcase in which he found a second revolver, also loaded with hollowpoint ammunition. The revolver was cocked and ready to fire. Boucher stated that the second revolver was also his. Cooper also discovered records which he believed evidenced drug transactions, as well as substantial currency in the briefcase.

Having discovered these items in the cab of the pickup, Cooper went to the rear of the truck and opened the door and tailgate of the camper shell. Inside the shell, Cooper observed coffee grounds scattered on the bed of the truck, an aerosol can of air freshener, and a bottle of ammonia. From Cooper's training and experience, he knew these items are commonly used to disguise the odor of narcotics from humans and dogs. The bed of the pickup was covered by a rubber bedliner which Cooper observed was raised approximately 18 inches at the cab end of the truck bed. Boucher stated that the raised portion of the bedliner served as a "bunk."

Cooper noted that Boucher was taller than the width of the truck bed and the "bunk" and proceeded to lift the bedliner at the place where it was raised. Cooper discovered four bales (77 pounds) of compressed marijuana buds under the bedliner.

In the district court, Boucher filed motions to suppress concerning the arrest and seizures involved in the case. After a hearing and a supplemental hearing on the suppression issues, the district court held that Boucher's statements made before he was advised of his *Miranda* rights were answers to questions incident to a routine traffic stop and were admissible. The district court also found that discovery of the revolver and the drug notes authorized the complete search of Boucher's vehicle and all items found pursuant to that search were admissible. We agree.

II. Traffic Stop and Search

This court has held that a "clearly erroneous" standard of review is to be applied when assessing a district court's decision to deny a motion to suppress. *United States v. Eisenberg*, 807 F.2d 1446, 1449 (8th Cir. 1986) (citing *United States v. Lewis*, 738 F.2d 916, 920 (8th Cir. 1984), *cert. denied*, 470 U.S. 1006 (1985)). We will affirm a district court's order denying a motion to suppress unless we find that the decision is unsupported by the evidence, based on an erroneous interpretation of the law, or we are left with a firm conviction that a mistake has been made. *United States v. Pantasiz*, 816 F.2d 361, 363 (8th Cir. 1987) (citing *United States v. Lewis*, 738 F.2d at 920). Boucher argues that the initial

traffic stop for speeding was unlawful and was simply a pretext for an investigatory stop. Boucher asserts that the record supports his claim because the government presented no evidence that Boucher was speeding other than Cooper's opinion as a police officer. We disagree. Cooper testified that he was absolutely certain that the vehicle was speeding and confirmed his observation by radar, although he did not get a "lock" on his reading. Based upon Cooper's testimony, the district court found that Boucher was speeding. Nothing in the record suggests that the finding was erroneous, or that Cooper stopped Boucher for any other reason, i.e., a hunch or suspicion that Boucher was committing some other offense.

Boucher next argues that even if he were speeding, Cooper's observation of the gun in the front seat during the traffic stop did not constitute probable cause for an arrest and subsequent search of the pickup. We disagree. Cooper first approached the pickup and asked Boucher for identification and registration. Because Cooper noted several inconsistencies in these documents, he asked Boucher to exit the pickup and sit in the patrol car for questioning. It is constitutionally permissible for a police officer to make such requests of a traffic violator. *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977).

The significant event in this case was Cooper's observance of the gun after Boucher exited the pickup. Cooper testified that the gun was stuck between the seat and the seat back. The gun was not in plain view prior to this time because Boucher was sitting on it and it was therefore concealed. Even if Boucher had not been sitting directly on top of the weapon, under Missouri law

a weapon is concealed when it is not visible from ordinary observation even where it is visible from one particular vantage point. *State v. Crews*, 722 S.W.2d 653, 654 (Mo. Ct. App. 1987). Carrying a concealed weapon is a violation of Missouri law. Mo. Rev. Stat. § 571.030(1) (1986). Therefore, Cooper had probably cause at that point to make an arrest, although he was not required to do so. An arrest for carrying a concealed weapon has been recognized as a sufficient basis for making a full custodial arrest by this court. *United States v. Jackson*, 741 F.2d 223, 224 (8th Cir. 1984).

III. Pre-*Miranda* Statements

Boucher next asserts that he was "in custody" long before Cooper formally arrested him, therefore his pre-arrest statements made in the patrol car regarding weapons, drugs, and cash, as well as his consent to search the truck, were tainted. We hold that Boucher was not in custody prior to the formal arrest which took place after Cooper's routine questioning in the patrol car and prior to the search of the trunk, and thus no waiver of Boucher's fifth amendment rights was required pursuant to *Miranda* until that time. *Miranda v. Arizona*, 384 U.S. 436 (1966). *Miranda* warnings are not imposed because the questioning is conducted in a certain place, i.e., a patrol car, or because the person being questioned is suspected of having committed some offense. *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977). The relevant inquiry is "how a reasonable [person] in the suspect's position would have understood [the] situation." *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984). This objective standard outweighs the suspect's subjective beliefs.

A reasonable person in Boucher's position would not have considered Cooper's questions in the patrol car a custodial interrogation. Boucher was unaware that Cooper had seen the gun in the seat. Boucher had no reason to suspect that Cooper knew of the gun or anything else in the pickup at that point and had no reason to believe that he was suspected of anything other than speeding. The observation of the weapon by Cooper and the non-custodial questioning based on his observations were lawful as incidental to the processing of a routine traffic stop. *Texas v. Brown*, 460 U.S. 730, 739 (1983). The fifth amendment protections offered by *Miranda* are designed to eliminate those situations where the person questioned could be induced to speak "where he would not otherwise do so freely." *Miranda v. Arizona*, 384 U.S. at 467. In a routine traffic stop, detention of an individual is usually temporary and public. The atmosphere of a traffic stop is "substantially less 'police dominated' than that surrounding the kinds of interrogation at issue in *Miranda* itself." *Berkemer v. McCarty*, 468 U.S. at 439. Furthermore, as noted above, Cooper was already aware of the gun in the pickup and it was reasonable for him to question Boucher about it prior to *Miranda* warnings. *United States v. Harris*, 611 F.2d 170, 173 (6th Cir. 1979) (questioning of suspect in his hotel room as to whether he had a weapon did not require *Miranda* warnings); *United States v. Harris*, 528 F.2d 914, 915 (4th Cir. 1975) (inquiry by federal agents as to whether suspect had a gun was not a "custodial interrogation" requiring *Miranda* warnings because agents had previously observed the gun and exercised no control over the suspect other than temporary detention and search), *cert. denied*, 423 U.S. 1075 (1976).

Boucher further contends that the questioning in the patrol car was a deliberate attempt by cooper to elicit incriminating statements through a "backdoor interrogation" when Cooper could have arrested him initially upon seeing the gun and given *Miranda* warnings at that time. Boucher argues that Cooper's plan effectively placed him in custody. However, the objective test set out in *Berkemer v. McCarty* dismisses this argument because Boucher was unaware of Cooper's intentions at the time. "A police [officer's] unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time." *Berkemer v. McCarty*, 468 U.S. at 442. For the reasons stated above, we hold that the district court did not err in admitting Boucher's pre-arrest statements concerning guns, drugs, and cash. Boucher's claim that his consent to search the pickup was the result of an illegal detention and a pretextual stop consequently fails as well.

IV. Scope of Consensual Search

Alternatively, Boucher argues that his consent to "look" in his truck was not a consent to "search" and therefore the scope of the search exceeded that consent. However, when Cooper asked Boucher if he could "take a look" in his truck, Boucher responded, "I'll help you get the stuff out, if you want." We agree with the district court's finding that Boucher could only have assumed the request was for a full examination of the pickup rather than a cursory look through the windows. We note, however, that the issue of consent is irrelevant in this case. Cooper already had probably cause to search the vehicle resulting from his observation of the concealed

weapon in the front seat. A warrantless search of an automobile does not violate the fourth amendment when there is probable cause to believe it contains contraband or other evidence of criminal activity. *Arkansas v. Sanders*, 442 U.S. 753, 760 (1979). As noted above, Cooper observed the weapon pursuant to a routine traffic stop and probable cause was created first by the observation of a concealed weapon, a violation of Missouri law, and secondly by Boucher's denial during non-custodial questioning that there were weapons in the pickup. Additionally, Cooper was justified in searching for the weapon (which he had already observed) pursuant to the limited search doctrine in *Michigan v. Long*, 463 U.S. 1032, 1047 (1983) (a protective search of the passenger compartment of a car is reasonable under the principles articulated in *Terry v. Ohio*, 392 U.S. 1 (1968), i.e., danger may arise from the possible presence of weapons in the area surrounding a suspect). *See also United States v. Ross*, 456 U.S. 798 (1982). In light of our determination that Cooper made a lawful search of the pickup, it is unnecessary to consider whether the inevitable discovery rule applies in this case.

V. Guilty Plea

Boucher finally asserts that the district court's acceptance of his guilty plea to the firearms count of his indictment was not supported by a sufficient factual basis on the record pursuant to Rule 11 of the Federal Rules of Criminal Procedure. After carefully reviewing the transcript of the Rule 11 proceeding, we conclude that the district court had sufficient facts upon which to accept Boucher's plea. The record clearly establishes

that Boucher had one fully loaded Smith and Wesson .34-122 caliber revolver on the front seat of his pickup which was concealed by his person. Boucher also had a loaded Walther PPK .380 caliber pistol in an unlocked briefcase on the floor of the cab. In his signed plea agreement, Boucher acknowledged the firearms were available for his use. This circuit has held that a violation of 18 U.S.C. § 924(c) is supported by showing that a firearm was available for use during and in relation to a drug trafficking offense. *United States v. Patterson*, 886 F.2d 217 (8th Cir. 1989); *United States v. Matra*, 841 F.2d 837 (8th Cir. 1988). Thus we reject Boucher's contention as without merit.

In summary, we hold that the district court committed no error in denying Boucher's motion to suppress and accepting the plea. Accordingly, the judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.